95-1669

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GEORGE GREGORY,

Cross-Petitioner,

v.

ELNORA CAMP, as Administrator of the Estate of Anthony Young,

Cross-Respondent.

On Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a state social services caseworker be held constitutionally liable under substantive due process principles when a teen-aged minor is shot and killed by a non-caretaker third party outside the home where the minor has been placed?

2. Does a state social services caseworker assume a constitutional duty to protect a teen-aged minor against private acts of violence under substantive due process principles when a state agency has legal custody of the minor while the minor's aunt retains actual physical custody of the minor?

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On Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-Petitioner, Illinois Department of Children and Family Services caseworker George Gregory, respectfully asks that, if this Court issues a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered on October 2, 1995, in response to the petition for writ of certiorari filed by Cross-Respondent Elnora Camp, this Court also review the Seventh Circuit's judgment and opinion in light of the questions raised in this cross-petition for writ of certiorari.

OPINIONS BELOW

The United States District Court for the Northern District of Illinois, Eastern Division, entered an unpublished memorandum opinion and order on August 10, 1993. (Camp's Pet. at 107a-09a). The United States Court of Appeals for the Seventh Circuit entered its opinion and judgment on October 2, 1995. The Seventh Circuit's opinion is published at 67 F.3d 1286. (Camp's Pet. at 1a-32a). The Seventh Circuit denied Camp's petition for rehearing in an unpublished order on October 23, 1995. (*Id.* at 33a). The Seventh Circuit denied Gregory's petition for rehearing with a suggestion for rehearing *en banc* in an unpublished order on December 4, 1995. (App. 1).

JURISDICTION

The Seventh Circuit entered its judgment on October 2, 1995. (Camp's Pet. at 1a). Camp filed a timely petition for rehearing on October 10, 1995, and the Seventh Circuit denied this petition on October 23, 1995. (*Id.* at 33a). On October 25, 1995, the Seventh Circuit granted Gregory's October 12, 1995 motion for an extension of time to file a petition for rehearing to and including October 30, 1995. Gregory filed a timely petition for rehearing with a suggestion for rehearing *en banc* on October 30, 1995, and the Seventh Circuit denied this petition on December 4, 1995. (App. 1). This conditional cross-petition is filed pursuant to Sup. Ct. R. 12.5. Camp's petition for a writ of certiorari (No. 95-1450) was docketed on March 11, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

"No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

I. The Events Prior to Anthony's Death

Because the District Court dismissed this action under Fed. R. Civ. P. 12(b)(6), Cross-Petitioner Gregory will treat all well-pleaded allegations in Camp's complaint and amended complaint as true for purposes of this cross-petition for writ of certiorari.

Prior to June 1991, minor Anthony Young, then age fifteen, had lived with Elnora Camp, who was both his aunt and his legal guardian. (R. Doc. 25 at ¶ 5). At some point, Camp decided that Anthony required more supervision than she could offer. (*Id.* at ¶ 6). Camp's allegations do not include specifics as to why she believed that Anthony required a higher level of supervision; they refer only to Anthony's allegedly "greater than normal exposure to the threat of physical harm from his home and neighborhood environment," and suggest that Anthony

was "in danger" and "at risk" in his "living environment." (R. Docs. 1-1 at ¶¶ 8, 10, 25 at ¶¶ 10, 12). The only allusion to what these dangers might have been was an allegation in the original complaint (conspicuously absent in the amended complaint) that Anthony had "a history of ongoing street-gang involvement." (R. Doc. 1-1 at ¶ 10).

In June 1991, by order of a state court and by consent of the parties, the Illinois Department of Children and Family Services (DCFS) became Anthony's guardian. (R. Doc. 25 at ¶ 6). Gregory was assigned to Anthony's case, and Anthony was placed back with Camp and his natural family. (*Id.* at ¶¶ 9, 12). Despite Camp's requests that Anthony be placed elsewhere, this had not occurred by December 1991, when Anthony died. (*Id.* at ¶ 15). In a letter sent to Gregory before Anthony's death, Camp had informed him that Anthony "was placing himself in situations jeopardizing his physical safety." (*Id.* at ¶ 14). The complaint and amended complaint alleged that Gregory had proximately caused Anthony's death, but gave no particulars as to the cause of death, the circumstances, or the individuals involved. (R. Docs. 1-1 at ¶ 11, 25 at ¶ 15). It was only at oral argument that Camp's counsel conceded that Anthony had been shot and killed two blocks from his home. (Camp's Pet. at 10a).

II. Proceedings in the District Court

Camp subsequently filed this 42 U.S.C. § 1983 action, naming Gregory as the sole defendant, on December 30, 1992. (R. Doc. 1-1). Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331 and 1343. Camp alleged that Gregory had violated Anthony's right to substantive due process when Anthony was placed in her home despite Gregory's

alleged knowledge that she could not provide adequate supervision. (*Id.* at ¶¶ 10-11). She sought five million dollars in damages. (*Id.* at ¶ 11). On August 10, 1993, the District Court dismissed the complaint for failure to state a claim, finding the action precluded by this Court's decision in *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (state officials generally have no duty to protect citizens against private violence). (Camp's Pet. at 107a-09a). After construing Camp's subsequent motion for leave to file an amended complaint to also encompass a motion for relief from judgment, the District Court granted the motion but dismissed the amended complaint for the same reason it had dismissed the original complaint. (*Id.* at 110a). Camp appealed to the Seventh Circuit, invoking its jurisdiction under 28 U.S.C. § 1291.

III. The Seventh Circuit's Opinion

The Seventh Circuit addressed two related substantive issues: 1) whether, by virtue of its status as Anthony's guardian, DCFS (and thus Gregory)* acquired any duty to protect Anthony that it otherwise would not have had under *DeShaney*; and 2) whether such a duty would extend to dangers beyond the household in which Anthony was placed. (Camp's Pet. at 11a).

In addressing the first issue, the Seventh Circuit held that "[w]e believe the fact that the DCFS had been made

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* It should be noted that DCFS, not Gregory, was appointed as Anthony's guardian by the state court. It should also be noted that Camp named solely Gregory in his individual capacity as a defendant in this suit; no high-ranking DCFS officials were named.

Anthony's guardian represents a key point of distinction from *DeShaney*." (*Id.* at 15a). The court reasoned that, at the point that DCFS accepted guardianship of Anthony, the issue of whether it had a duty to intervene became moot because it had already assumed a role that made it constitutionally liable to some extent for Anthony's well-being. (*Id.*).

The Seventh Circuit then addressed the second issue: Gregory's duty to protect Anthony outside his family's home. (*Id.* at 24a-29a). The court noted that this issue posed "a more novel and difficult question" than the previous issue. (*Id.* at 24a). Nonetheless, the court held that caseworkers may be held constitutionally liable when inadequate supervision results in injury outside the home in "a very narrow range of cases." (*Id.* at 26a). For liability to attach, the Seventh Circuit established that the following criteria must be met: the placement decision must demonstrate a failure to exercise bona fide professional judgment; the caretaker must have failed to provide only reasonable, not extraordinary, supervision; the injury must be reasonably foreseeable to the caseworker; and there must be sufficient causal linkage between the lack of reasonable supervision and the injury. (*Id.* at 26a-27a).

Even though the Seventh Circuit reached these two substantive issues, it found Gregory to be entitled to qualified immunity because the law was not clearly established in 1991 that a constitutional right to adequate supervision and guidance existed in these circumstances. (*Id.* at 30a).

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI BECAUSE THE SEVENTH CIRCUIT'S NOVEL EXTENSION OF CONSTITUTIONAL LIABILITY UNDER SUBSTANTIVE DUE PROCESS PRINCIPLES TO SITUATIONS WHERE MINORS ARE KILLED BY NON-CARETAKER THIRD PARTIES OUTSIDE THE HOMES WHERE THEY HAVE BEEN PLACED CONFLICTS WITH *DESHANEY v. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES* AND OTHER PRECEDENT.

The Due Process Clause of the Fourteenth Amendment was intended to secure the individual against the arbitrary exercise of the powers of government. *Collins v. City of Harker Heights*, 503 U.S. 115, 127 n.10 (1992). Therefore, the substantive component of the Due Process Clause "*bar[s]* certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (emphasis added).

In *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 194-97 (1989), this Court concluded that the negative phraseology of the Due Process Clause cannot be read to impose affirmative obligations on the State to ensure an individual's protection against harm. Therefore, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 197.

While affirming the principle that the Constitution affords no relief for a State's failure to protect a person against private violence, *DeShaney* also recognized that there may be limited circumstances under which an

affirmative obligation may be imposed on the State to protect an individual against harm by private persons. *Id.* at 198-200. The Court suggested that despite the Fourteenth Amendment's provision for negative liberties, the amendment may create "positive liberties" under very limited circumstances.

One exception to the rule was that the State has no duty to protect its citizens where "the State takes a person into its custody and holds him there against his will," as in the case of imprisonment, institutionalization, or some such other restraint on an individual's personal liberty. *Id.* at 199-200; *see also J.O. v. Alton Community Unit School Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990) ("The state's custody over their person is the most distinguishing characteristic in the cases of the mental patient and the prisoner; these people are unable to provide for basic human needs like food, clothing, shelter, medical care, and reasonable safety"). *DeShaney* makes clear, however, that the duty "arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." 489 U.S. at 200.

In a similar vein, *DeShaney* also suggested that another exception may exist where the State has played a part in creating the danger that threatened the person or has somehow made him more vulnerable to a pre-existing danger. *Id.* at 201. Once again, in this context, it is the *affirmative* role that the State assumes in creating the danger that gives rise to the duty. *See also Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) ("If the state puts a man in a position of danger from private persons

and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit").

In each of these exceptions, as in the very holding of *DeShaney* itself, the touchstone of the analysis is necessarily the scope of protection offered by the Due Process Clause. The core concern of that provision is, of course, the protection of individuals against actions of the State, not the actions of private parties.

Various circuit courts of appeals have recognized that social services caseworkers may be held constitutionally liable when minors are placed with non-relatives and the caseworkers have reason to know the minors will suffer abuse. *Norfleet by and through Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289, 290 (8th Cir. 1993); *Yvonne L. by and through Lewis v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 885 (10th Cir. 1992); *K.H. through Murphy v. Morgan*, 914 F.2d 846, 848 (7th Cir. 1990); *Taylor by and through Walker v. Ledbetter*, 818 F.2d 791, 792 (11th Cir. 1987) (*en banc*), *cert. denied*, 489 U.S. 1065 (1989); *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134, 137 (2nd Cir. 1981), *cert. denied sub nom. Catholic Home Bureau v. Doe*, 464 U.S. 864 (1983). In these cases, however, it was the State's surrogate or a member of the surrogate's household, not an unconnected third party, who posed the direct threat to the individual and, in a very real sense, prevented that person from protecting himself against a foreseeable risk of harm.

A. The Seventh Circuit's Holding That Caseworkers May Be Held Constitutionally Liable for Injuries Sustained Outside the Homes Where Minors Have Been Placed and Inflicted by Non-Caretaker Third Parties Expands Substantive Due Process Protections to an Extent Not Supported by the Constitution or This Court's Precedent.

The most troubling aspect of the Seventh Circuit's decision is its imposition on social services workers of the constitutional duty to anticipate, investigate, and prevent dangers *outside* of the foster homes where minors are placed, in tandem with a constitutional duty to evaluate what effect, if any, the caretakers' inability to control the minors increases the likelihood that the minors will be injured by such dangers. In requiring caseworkers to do more than to make sure that the foster homes in which the minors are placed are reasonably safe and that the members of those households are not likely to commit abuse, the court has expanded the duties owed by state officials to citizens under substantive due process principles in a manner that is not supported by the Constitution or precedent.

While the Seventh Circuit, in this case, was sensitive to the myriad factors that may contribute to the determination of whether a constitutional duty exists, it nonetheless defined the duty in a manner that is not harmonious with *DeShaney* or with the scope of due process protection. Even the sparse facts alleged do not permit an inference that the State itself restricted Anthony's freedom, rendering him unable to protect himself against harm. Similarly, the allegations do not permit an inference that the State created the danger that directly resulted in Anthony's death.

To the contrary, the Seventh Circuit's extension of the duty in this case has no direct link to the actions of the State, the actions with which the Due Process Clause is concerned. No allegations suggest that Camp, the State's chosen caretaker, was herself abusive or neglectful toward Anthony. Indeed, at most, they suggest that Camp, like many parents, was unable to exert the appropriate influence over a teen-ager to make him confine his own choices or restrict his own behavior. This distinction is an important one where the liability of the state actor depends not on duties established by state tort law but by the Due Process Clause, which is fundamentally focussed on governmental restrictions upon the exercise of personal choices.

In suggesting that a duty may extend to the circumstances alleged in this action, the Seventh Circuit expanded the reach of the Due Process Clause in precisely the way *DeShaney* cautioned against. It recognized not simply a duty of protection against surrogates of the State but an affirmative duty to guard against the random acts of third parties. Whether the neglect of a state surrogate may ever constitute a due process violation is not the question presented by the allegations of this case and should not have been resolved under the facts alleged. The allegations here—that a concerned but (at worst) ineffectual caretaker could not prevent the death of a ward at the hands of third parties with no asserted connection with the caretaker—simply do not fall within the scope of duties arising from the Due Process Clause.

Accordingly, the Seventh Circuit misapprehended the governing law when it expanded the principles of substantive due process to encompass the type of claim

Camp brought in the instant case, and this Court is respectfully requested to grant certiorari to review that portion of the Seventh Circuit's opinion that imposes constitutional liability on caseworkers when minors are injured or killed by third parties with no asserted connection to the caretakers outside the homes where they have been placed.

B. The Seventh Circuit's Holding That Legal Custody of a Minor, as Opposed to Actual Physical Custody, Imposes an Affirmative Duty on the State and Its Agents Under Substantive Due Process Principles to Protect the Minor Against Private Acts of Violence Conflicts with *DeShaney v. Winnebago County Department of Social Services* and the Eleventh Circuit's Decision in *Wooten v. Campbell*.

The Seventh Circuit misapprehended the applicable law in determining what type of state custody is required before a duty arises under the Due Process Clause to protect a citizen against private violence.

In *DeShaney*, this Court explained that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." 489 U.S. at 199-200. "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id.* at 200. The Court gave as examples of such custody "incarceration, institutionalization, or other similar restraint of personal liberty." *Id.*

Taking heed of this language, circuit courts of appeals (including the Seventh Circuit) have previously noted that *DeShaney's* imposition of an affirmative obligation to protect in the custodial setting is limited to when the State has "*actual* physical custody." *See, e.g., Doe by Nelson v. Milwaukee County*, 903 F.2d 499, 502 n.5 (7th Cir. 1990) (emphasis in original). Here, although DCFS had *legal* custody of Anthony based on the June 1991 court order appointing it his guardian, it was Anthony's aunt who retained *actual physical* custody of him at the time of his death.

In a recent case that directly conflicts in principle with the Seventh Circuit's decision in the instant case, the United States Court of Appeals for the Eleventh Circuit held that state officials whose agency had legal custody of a minor were not constitutionally liable for his death under substantive due process principles because his natural mother had actual physical custody of him at that time. *Wooten v. Campbell*, 49 F.3d 696, 700-01 (11th Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 379 (1995). In *Wooten*, the State had actively obtained legal custody of the minor after the natural mother had been unable to prevent the danger of the child's abduction by the natural father. 49 F.3d at 698. Employees of the social services agency decided to place the minor back with his natural mother and to allow the natural father unsupervised visitation, although the agency retained legal custody. *Id.* Subsequently, the natural father again abducted the minor, the very same danger that the minor had faced prior to the State's assumption of legal custody. *Id.* The second abduction culminated in the minor's death at the hands of his natural father. *Id.*

The Eleventh Circuit framed the issue as "whether a substantive due process right is implicated where a public agency is awarded legal custody of a child, but does not control that child's physical custody. . . ." *Id.* at 699. The court then noted that the facts before it were distinguishable from a standard foster care situation, because the minor was in the physical custody of his natural mother at the time of his death, not in a third-party foster home. *Id.* The court found this distinction dispositive because in the standard foster care setting the State exercises control and dominion over the minor; in such circumstances, if the minor is injured by the state-selected foster family (which is in a very real sense a state actor), he or she has a section 1983 claim for a violation of a constitutional right. *Id.*

The Eleventh Circuit then concluded that, because the minor remained in the physical custody of his natural mother who was free to take steps to protect him against harms perpetrated by other persons, no constitutional liability could attach to the caseworkers. *Id.* at 701. The court found that the caseworkers did not control the minor's life to such an extent that his mother could not reasonably be expected to protect him. *Id.* Accordingly, the court concluded that the mother's complaint failed to state a claim upon which relief could be granted and should have been dismissed. *Id.*

In light of the holdings of *DeShaney, Doe by Nelson*, and *Wooten*, the Seventh Circuit erred in its determination that mere "paper" custody of a minor by a state agency is sufficient to impose an affirmative constitutional duty to protect against private violence on state officials where the minor's natural family retains actual

physical control. Although *Wooten* involved actual physical custody of the minor by a mother rather than an aunt, the principle involved—that the State did not have such control and dominion over the minor as to impose a constitutional duty on its agents to protect him against private violence—directly conflicts with the Seventh Circuit's holding that mere legal custody is sufficient to impose such a duty. Gregory did not have such physical control and dominion over Anthony that he could have prevented Anthony's involvement in the shooting incident on the day that he died; Anthony's aunt, if anyone, was in the best position to exercise such control and dominion.

In addition to holding that mere legal custody by a state agency creates a constitutional duty to protect against private violence, the Seventh Circuit noted that "[h]ad the state simply turned a deaf ear to Camp's pleas in the first instance, it would have no constitutional liability under *DeShaney*." (Camp Pet. at 21a). This qualification creates a surely unintended incentive; state officials are warned that intervention on their part, such as accepting legal custody, opens the door to substantial liability (Camp sought five million dollars here) and that the safest course of conduct is to take no action in borderline situations. As a matter of policy, such an incentive does little to further the interests of children in peril.

Cross-Petitioner Gregory therefore respectfully asks that this Court grant the writ of certiorari to clarify, consistent with *DeShaney* and *Wooten*, that an affirmative duty to protect a minor against private violence is limited to circumstances in which the State has such phy-

sical control and dominion over the minor to demonstrate *actual physical* custody of the minor, one of the two exceptions recognized in *DeShaney* to the general rule that state officials have no duty to protect citizens against private violence.

CONCLUSION

The Seventh Circuit's decision in this case is inconsistent with this Court's decision in *DeShaney* and other precedent, and directly conflicts in principle with the Eleventh Circuit's decision in *Wooten*. En route to passing on the qualified immunity issue (on which it found in favor of Cross-Petitioner Gregory), the Seventh Circuit recognized a wholly new right for plaintiffs and a wholly new duty for defendants under substantive due process principles that substantially expands the heretofore recognized constitutional duties of social services caseworkers. The decision does not merely hold caseworkers responsible when minors are placed in non-relative foster homes that are in themselves dangerous (a right that has previously been recognized), it holds caseworkers responsible when minors are placed in foster homes headed by family members based on allegations that these family members are incapable of adequately controlling the minors and where the minors suffer harm, not at the hands of the family members or members of their households, but at the hands of third parties with no alleged connections to the family members acting as foster parents. Given the gravity of the issues presented, the ramifications of the Seventh Circuit's decision for caseworkers who are faced with difficult and daily decisions about the best interests of minors, and the novel expansion of con-

stitutional liability in this case, this Court should address the questions raised in this cross-petition in the event it grants certiorari in response to Camp's petition.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Decided December 4, 1995

Before

Honorable John L. Coffey, *Circuit Judge*
Honorable Ilana Diamond Rovner, *Circuit Judge*
Honorable James L. Foreman, *District Judge**

No. 93-3314

ELNORA CAMP, as Administrator of the Estate of ANTHONY YOUNG,

Plaintiff-Appellant,

v.

GEORGE GREGORY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 8424—James B. Moran, *Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by defendant-appellee on October 30, 1995, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition. Accordingly,

IT IS HEREBY ORDERED that the petition for rehearing with suggestion for rehearing en banc be, and the same is, hereby DENIED.

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* The Honorable James L. Foreman, of the Southern District of Illinois, sitting by designation.